

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ARTURO AVILA,
Petitioner.

No. 2 CA-CR 2018-0222-PR
Filed October 30, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pima County
No. CR20103744001
The Honorable Scott Rash, Judge

REVIEW GRANTED; RELIEF DENIED

Arturo Avila, Florence
In Propria Persona

STATE v. AVILA
Decision of the Court

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

E C K E R S T R O M, Chief Judge:

¶1 Arturo Avila seeks review of the trial court’s order summarily denying his untimely notice of and petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We find no such abuse here.

¶2 Following a jury trial, Avila was convicted of three counts of sexual abuse of a minor under fifteen, six counts of sexual conduct with a minor under fifteen, and two counts of molestation of a child. The trial court sentenced Avila to consecutive and concurrent prison terms totaling 137 years. We affirmed his convictions and sentences on appeal. *State v. Avila*, No. 2 CA-CR 2013-0145 (Ariz. App. Apr. 25, 2014) (mem. decision).

¶3 In October 2016, more than two years after we issued the mandate in Avila’s appeal, he filed a notice of post-conviction relief indicating his claim was based on ineffective assistance of counsel and that his failure to file a timely notice was not his fault. *See* Ariz. R. Crim. P. 32.1(a), (f).¹ To the extent Avila attempted to provide a reason for his late filing, he asserted: “I was never told about the post-conviction relief process by my attorneys, translators or judges[.] I had no idea!” Appointed counsel subsequently notified the court she was unable to find any meritorious issues to raise, and Avila filed a pro se petition. In that petition, Avila again asserted his late filing was not his fault and raised several claims of ineffective assistance of trial and appellate counsel.

¶4 The trial court summarily dismissed the Rule 32 proceeding, concluding Avila was not entitled to relief pursuant to Rule 32.1(f) because, contrary to his claim that he had not been told about the timeliness

¹We apply the current version of the rule, as doing so will neither “be infeasible [n]or work an injustice.” Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017).

STATE v. AVILA
Decision of the Court

requirement for filing a notice of post-conviction relief, he had “signed two[] copies (one in Spanish and one in English) of the ‘Notice of Rights of Review After Conviction’ which acknowledge his receipt on the day of sentencing[, and] detail the Rule 32 process and the necessary time limits he was required to adhere to.” The court also determined that “neither the Notice nor the Petition adequately explain the reason for the delay in filing.” *See* Ariz. R. Crim. P. 32.2(b) (“If [a successive or untimely] notice does not identify a specific exception [to preclusion] or provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice.”).

¶5 On review, Avila reasserts that his failure to file a timely notice of post-conviction relief was without fault on his part, *see* Rule 32.1(f), and also attempts to raise claims of ineffective assistance of trial, appellate, and Rule 32 counsel, contending those claims “should be considered on the merits regardless of any question of timeliness.” But, as the trial court correctly recognized, Avila’s notice was patently untimely. Avila concedes that the court correctly noted he had signed a notice setting forth the requirements for filing a timely notice of post-conviction relief, but nonetheless maintains “he had neither the time nor opportunity to learn the substance of the notice, nor was he in the proper frame of mind . . . to absorb and understand the meaning of the notice.” And, acknowledging that the reason given for his late filing was “sparse,” he nevertheless contends he is entitled to relief under Rule 32.1(f).

¶6 To the extent Avila maintains the trial court “did not take Rule 32.1(f) . . . into account” in its ruling, the court’s ruling belies his claim. Moreover, in addition to the court’s proper conclusion that Avila had not established a claim based on Rule 32.1(f), Avila’s reliance on that rule is misplaced. That rule, which provides a ground for relief when the defendant’s “failure to file a notice of post-conviction relief of-right or a notice of appeal within the required time was not the defendant’s fault,” does not apply here. Rule 32.1(f) only applies to “of-right” proceedings, and does not provide relief from the preclusive effect of Rule 32.2(a) for a non-pleading defendant like Avila, who has already been afforded a direct appeal. *See* Ariz. R. Crim. P. 32.1 (defining “of-right” proceedings). Because we agree with the court that Avila failed to show why his claims were not untimely under Rule 32.2(b), and because Avila was not, in any event, entitled to relief under Rule 32.1(f), we find the court correctly dismissed his proceeding.

¶7 Accordingly, we grant review but deny relief.